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No. 97-327

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

CONSUMERS EDUCATION & PROTECTIVE ASSOCIATION, and LANCE HAVER,

Petitioners,

v.

PENNSYLVANIA MILK MARKETING BOARD, LEHIGH VALLEY DAIRIES, INC., ATLANTIC DAIRY COOPERATIVE, PENNSYLVANIA ASSOCIATION OF MILK DEALERS, ROSENBERGER'S DAIRY, INC., CLOVER FARMS DAIRY, and WAWA DAIRY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF OF RESPONDENTS LEHIGH VALLEY DAIRIES, INC., PENNSYLVANIA ASSOCIATION OF MILK DEALERS, ROSENBERGER'S DAIRY, INC., CLOVER FARMS DAIRY and WAWA DAIRY IN OPPOSITION

J. JACKSON EATON, III
GROSS, McGINLEY, LaBARRE & EATON, LLP
33 South Seventh Street
P.O. Box 4060
Allentown, PA 18105
(610) 820-5450
Attorney for Respondent Lehigh Valley Dairies, Inc.

DONALD A. TORTORICE
(Counsel of Record)
DOUGLAS M. WOLFBERG
DUANE, MORRIS & HECKSCHER, LLP
305 North Front Street
5th Floor
P.O. Box 1003
Harrisburg, PA 17108
(717) 237-5500
Attorneys for Respondents.

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QUESTION PRESENTED

Does a state law violate the commerce clause of the U.S. Constitution because it establishes minimum resale prices within the state for milk products based upon costs of a representative cross section of milk producers serving the market, including in-state and out-of-state processor costs, where the state market is open to all processors at or above the determined prices?

PARTIES TO THE PROCEEDINGS, RULE 14.1(b)

The parties upon whose behalf this Brief is filed are Lehigh Valley Dairies, Inc., the Pennsylvania Association of Milk Dealers, Rosenberger's Dairy, Inc., Clover Farms Dairy, and Wawa Dairy.

The parent corporation of Lehigh Valley Dairies, Inc. is Lehigh Enterprises Acquisition Corp., a wholly owned subsidiary of Mid-America Dairymen, Inc.

Wawa Dairy is an operating Division of Wawa, Inc.

Other than noted, the parties have no other parent companies nor nonwholly owned subsidiaries.

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TO THE HONORABLE SUPREME COURT:

The Respondents, Lehigh Valley Dairies, Inc., Pennsylvania Association of Milk Dealers, Rosenberger's Dairy, Inc., Clover Farms Dairy, and Wawa Dairy respectfully

request that this Court deny the Petition for Writ of Certiorari submitted by Petitioners.

COUNTERSTATEMENT OF THE CASE

Petitioners' Statement is inaccurate in asserting that the Pennsylvania Milk Marketing Law (the "Law"; Act of April 28, 1937 P.L. 417, as amended, 31 P.S. §700j-101 to 700j-1302) mandates retail prices paid by consumers to milk processors. Petition at p. 2. Rather, the Law sets the wholesale prices at which processors sell milk to stores (in this instance, the Philadelphia School District) and prices then applicable to sales from stores to consumers. *See* 31 P.S. §700j-802. The children of Philadelphia do not buy milk from processors; they buy from the School District.

Petitioners presume to speak for the interests of the School District of Philadelphia and equate its interest with that of attending children. Petitioners contend that over 90% of the milk purchased by the School District is "given" to children attending the District. In actuality, the Director of Food Services of the District provided illuminating information about what the District charges for school meals and what it recoups. The Director revealed that the District's cost for food at lunch is $.95 or $.72 per meal (App., 3a), but that the payment it receives, whether from the federal government, the state, or children who purchase their own food, is between $1.38 and $1.86 (App., 2a-3a).

The Director of Food Services also revealed a startling fact that whenever the District sells over-the-counter food, its standard mark-up is 100% (App., 1a). Thus, if the District buys a half pint of milk for $0.175, the price to students is doubled to $0.35 (App., 1a). Indisputably, the record provides no support for any assertion

that the District "gives" milk or any other food to children nor that milk prices are truly contributing to any condition of economic extremis for the School District of Philadelphia.

Petitioners also state that the average price developed under the Milk Marketing Law "is derived by reference to *only* local producers."[1] Petition at p. 4. This is a misstatement of fact since the five companies in the cross-section used to determine Pennsylvania minimum prices included a New Jersey processor, Readington Farms. As the witness for the Pennsylvania Milk Marketing Board (PMMB or "the Board") staff pointed out, eastern Pennsylvania is a highly competitive area with a specific New Jersey influence which staff did not want the Board to overlook. As a result, Readington Farms, as a large and efficient dealer, was selected as a representative of the out-of-state influence. (App., 4a-5a). The implication sought by Petitioners, that Pennsylvania prices are predicated upon only local producers, is therefore flatly incorrect in that the cross-section utilized by the Board represented not only in-state dealer costs but also the costs of out-of-state production as well.

In recognition of its responsibility to consider all factors which affect the eastern Pennsylvania market, the Board thus reflected in its pricing order a combined influence of in-state and out-of-state costs. (App., 4a-5a). In addition, the originating case below was a general price hearing which was conducted following full public notice and opportunity to be heard by all interested

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[1] Petitioners' Brief frequently confuses the term, "producers" with "dealers." As defined in the Law and as used in the milk industry generally, producers are dairy farmers and milk processing companies are dealers. See 31 P.S. 700j-103.

parties, either in-state or out-of-state. There is also no evidence whatever that the administrative proceeding below was commenced in retaliation for the suit of the School District, *School District of Philadelphia v. Pennsylvania Milk Marketing Board,* 877 F. Supp. 245 (E.D. Pa. 1995) nor is there any evidence that the School District dropped pursuit of that litigation. In fact, by order of court, the School District was dismissed from the case. *See* 877 F. Supp. at 254.

It is also appropriate to point out that the School District of Philadelphia has not filed any brief in support of the Petition, nor have any out-of-state dealers who, Petitioners have claimed, are disadvantaged by the Law.

Finally, Petitioners quote a PMMB staff witness, that the "price [set by PMMB] is exorbitant," to criticize the Board's dealer cross-section, which is taken entirely out of any accurate or proper context. Petition at p. 4. Petitioners' characterization erroneously asserts that this expert testified that the price of milk resulted from inflated costs of producers in the cross-section. Actually, the quote pertained to a question relating solely to the elasticity of milk demand and is accurately set forth as follows:

> Q. Finally, just one more question. Again, referring to Mr. Herbein's testimony, he was asked on cross examination what effect significant reductions in prices would have on the marketplace and on consumer behavior. How would you answer that same question?
>
> A. Knowing that the market price for milk, the MW price, fluctuates throughout the year, we are aware that consumption patterns do not mirror those changes significantly, so that we would say that consumption patterns are not overly affected by changes

in pricing. It takes just as much milk to put on your Cheerios if it's $2.00 a gallon as $2.10. So, we think that milk is relatively inelastic and thus the price is exorbitant.

(App. 5a-6a)

The witness was *not* commenting in any way upon prices proposed for the order nor upon the dealer cross-section at this point in his testimony. In fact, he gave the following testimony regarding the appropriateness of the cross-section:

Q. That all depends on whether or not the cross-section is representative of something. It's got to be representative of something. Correct?

A. We believe the cross-section we selected is representative of milk marketing Area 1, period.

(App., 7a) Petitioners have lifted the quote from one section of the transcript and presented it in the context of entirely unrelated testimony.

In short, the record has been inaccurately restated by Petitioners. The record, as cited above, reflects even-handed application of a facially nondiscriminatory milk marketing law.

SUMMARY ARGUMENT IN OPPOSITION TO CERTIORARI

The Petition for Writ of Certiorari should be denied. In Pennsylvania, the sale of milk is regulated and controlled by the Milk Marketing Law, *supra.* The Law is implemented by the Milk Marketing Board, an independent administrative agency which fixes minimum prices for milk sold by farmers, milk sold at wholesale, and retail out-of-store milk. 31 P.S. 700j-101 *et seq.*

This Court has twice upheld the constitutionality of the pricing provisions of the Law as an appropriate exercise of the police powers of the Commonwealth of Pennsylvania. *Milk Control Board of Pa. v. Eisenberg Farm Prods.*, 306 U.S. 346 (1939); *Penn Dairies, Inc. v. Milk Control Comm'n of Pa.*, 318 U.S. 261 (1943). *See also Nebbia v. New York*, 291 U.S. 502 (1934), upholding New York's minimum milk price control law.

The heart of Petitioners' claim is that the price-setting mechanism of the Milk Marketing Law is protectionist because it precludes out-of-state milk dealers from selling milk in Pennsylvania at prices below the minimum prices set by the Milk Marketing Board, thereby precluding out-of-state dealers from an alleged competitive advantage. Minimum pricing, Petitioners argue, amounts to economic protectionism of Pennsylvania's milk industry. The argument is meritless. Whatever advantage or burden the Law provides to or imposes upon any dealer, those effects accrue equally to in-state and out-of-state dealers.

Unquestionably, whether dealers are efficient or inefficient, such characteristics exist both in-state and out-of-state, and "the fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp. v. Maryland*, 437 U.S. 117, 126 (1978). This issue has been presented to this Court; has been resolved by it; and has been correctly interpreted in review of issues presented by this case in the federal court (*School District of Philadelphia v. Pennsylvania Milk Marketing Bd.*, 877 F. Supp. 245 (E.D. Pa. 1995)), as well as the Commonwealth Court of Pennsylvania (*School District of Philadelphia v. Pennsylvania Milk Marketing Bd.*, 683 A.2d 972 (Pa. Commw. Ct. 1996), *App. Denied*, 694 A.2d 625 (Pa. 1997)).

Petitioners attempt to support their case by claiming that Pennsylvania has higher prices attributable to application of the Law, allegedly demonstrating an inefficiency of Pennsylvania dealers. The argument is devoid of logical or evidentiary support, as demonstrated in the Pennsylvania Commonwealth Court. Since any "protectionism" in the law aids (or burdens) similarly inefficient dealers from any state, the law is geography-neutral. As noted by the United States Court of Appeals for the Third Circuit,

> where the "burden" of out-of-state interests is no different from the placed on competing in-state interests, however, it is a burden on *commerce* rather than a burden on *interstate* commerce.

Norfolk Southern Corp v. Oberly, 822 F.2d 388, 406 (3d Cir. 1987).

The principles set forth above are established and settled principles of law. These principles support the appropriate application of the state's police power under the Milk Marketing Law without unduly burdening interstate commerce. These principles have thus been correctly interpreted by both the U.S. District Court as well as the Pennsylvania Commonwealth Court in their well reasoned opinions cited above.

ARGUMENT

THERE ARE NO CONFLICTS BETWEEN THE OPINIONS OF THE STATE COURT AND THIS COURT OR OF OTHER FEDERAL COURTS WHEN THE STATE COURT CORRECTLY HELD THAT THE PENNSYLVANIA MILK MARKETING LAW EVENHANDEDLY REGULATES THE COMMONWEALTH'S MILK INDUSTRY AND ONLY INCIDENTALLY BURDENS INTERSTATE COMMERCE.

Petitioners are dissatisfied with an Area I pricing order of the Board, resulting from a hearing which afforded ample opportunity for all interested parties, in-state and out-of-state, to participate. Petitioners have been rebuked by the Pennsylvania Commonwealth Court, and the Pennsylvania Supreme Court denied their request for appellate review. They now seek review in this Court essentially to correct perceived errors in the decisions of the state intermediate appellate court, notwithstanding that those decisions are fully supported by the decision of the federal court in *School District of Philadelphia v. Pennsylvania Milk Marketing Bd., supra.* It would be improvident to grant the petition, first, because the state court was correct in its holding under the commerce clause, and second, because the state court's decision is consistent with the commerce clause jurisprudence of this Court and of other federal courts. Petitioners seek to create the appearance of conflicts where none exist and, in so doing, misconstrue the case law and misstate the factual record.

A. The Pennsylvania Milk Marketing Law Evenhandedly Regulates The Price Of Milk Sold In The Commonwealth.

The threshold inquiry in a negative commerce clause analysis is whether the challenged state law discriminates or regulates evenhandedly. *Brown-Forman Distillers*

Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986). When discrimination is manifest in purpose or effect, the state must assume the burden of justifying its actions with reasons unrelated to economic protectionism. *Id.* On the other hand, if the regulation evenhandedly effectuates a legitimate local public interest, and its effects on interstate commerce are incidental, "it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Thus, in the presence of discriminatory purpose or effect, a state law is presumptively unconstitutional, but in the absence of discrimination, the law is accorded the opposite – a presumption of validity.

As the Commonwealth Court correctly decided, the Milk Marketing Law regulates evenhandedly both on its face and in effect. Pennsylvania's milk regulation has been upheld throughout nearly fifty years of litigation, some of it in this Court and much by other courts under this Court's negative commerce clause analysis. *See Milk Control Board of Pa. v. Eisenberg Farm Prods., supra; Penn Dairies, Inc. v. Milk Control Comm'n, supra; Sylvan Seal Milk, Inc. v. Milk Control Comm'n of Pa.*, 270 F. Supp. 117 (E.D. Pa. 1967); *Milk Control Comm'n v. Rieck Dairy Division of Nat'l Dairy Prods. Corp.*, 193 Pa. Superior Ct. 32, 163 A.2d 891 (1960); *Finucane v. Pa. Milk Marketing Bd.*, 136 Pa. Commw. Ct. 272, 582 A.2d 1152 (1990); and *School Dist. of Phila. v. Pennsylvania Milk Marketing Bd., supra.* The statute has survived intact through every challenge.

In arguing that the statute is facially discriminatory, Petitioners overlook the fact that the statute also directs the Board to establish milk prices after giving all inter-

ested persons reasonable opportunity to be heard. 31 P.S. 700j-801. The statute's definition of "interested person" is geography-neutral, and, in fact, the Board considered the cost of both in-state and out-of-state dealers in establishing the minimum prices for Area I. (App., 6a-7a).

In upholding New Jersey's regulation of milk-pricing, the court in *New York v. Brown,* 721 F. Supp. 629 (D.N.J. 1989), was confronted with statutory language which the State of New York cited as evincing a discriminatory purpose to "salvage the state's dairy industry," much like the language of the Pennsylvania law cited by Petitioners ("the Board . . . shall . . . maintain such prices . . . as . . . will best protect the milk industry of the Commonwealth"). Petition at p. 9. The *Brown* court concluded that it did "not find this statement to evince purposeful discrimination," and noted that the statute, when fairly read in its entirety, "was aimed at protecting New Jersey's milk industry from itself, not from outside competition." *Id.* at 640. The same can be said of the innocuous language cited by Petitioners.

Petitioners cite to *Sylvan Seal, supra,* and proclaim that a "three-judge federal court has already found that the purpose of the milk marketing law is, *inter alia,* to authorize the PMMB to 'protect Pennsylvania processors from . . . out of state businesses.' " Petition, p. 9. Petitioners would mislead the Court into believing that another federal court has found the statute to be facially discriminatory and unconstitutional. The opposite actually occurred in *Sylvan Seal.* The above quote must be read in context: the court actually wrote that "[w]hile [the Commission] may attempt to protect Pennsylvania processors from and help them compete with out-of-state businesses, it must also and in fact has considered the

price structure among this state's milk handlers inter se. Simply because neighboring states may set different prices or have no price controls at all does not require the Commonwealth to abandon its own price system." *Id.* at 121.

It is thus clear that the *Sylvan Seal* court was characterizing the actions of the Milk Control Commission (the predecessor to the current Board); it was *not* declaring the Law to be facially discriminatory. Moreover, the court upheld minimum pricing by the state, having concluded that "there is no substantial constitutional question as to the validity of [the Commission's] present pricing structure for Areas I and I-A" (the same areas at issue in this litigation). *Id.* Finally, *Sylvan Seal* was a due process case; the commerce clause was not invoked. Its citation by Petitioners is, at best, misguided, and at worst, misleading.

Petitioners also claim that the Law evinces an "avowed purpose" to "mitigate the consequences of competition between the states" and is "motivated by an intent to confer a benefit upon local industry not granted to out-of-state industry." Petition at p. 10. This claim is also inaccurate. Petitioners have cited no legislative history, no relevant cases, no reports or studies or any other source whatsoever to ascribe to the Commonwealth such a repressive motive. The line of text which petitioners cull from the statute, to "protect the milk industry of the Commonwealth", amounts to a misleading quote because the statute is facially neutral toward interstate commerce and because, as the record reflects, the Board also observed the requirement that it consider "all conditions affecting the milk industry" (31 P.S. § 700j-801). Procedures followed by the Board afforded out-of-state dealers every opportunity to be heard. It also

included a large out-of-state dealer's costs in the actual calculation of the Area I minimum prices.

Because the Pennsylvania law is non-discriminatory on its face, the next question is whether the statute is discriminatory in its application or effect. The state court correctly decided that it is not.

B. The Pennsylvania Milk Marketing Law Is Non-Discriminatory In Both Its Application And Effect.

Petitioners argue that the law is invalid under this Court's decisions in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) and *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) because it has a discriminatory effect in purportedly "neutralizing the advantage possessed by lower cost out-of-state producers." Petition at p. 11. Both cases are wholly inapplicable to the facts of this case.

In *Baldwin*, this Court struck down a New York law which required dealers selling milk in-state to pay their producers the New York-mandated minimum prices, even when the dealers acquired their milk outside the state. The Court struck down the law because it had the impermissible effect of projecting New York regulation into another state whose competition was hampering New York producers. Because this scheme explicitly discriminated against interstate commerce, the Court was not required to weigh whether the effects of the discrimination were direct or indirect. The state court here was faced with no such explicit discrimination and thus correcely assessed whether the statute directly or indirectly burdened interstate commerce.

Unlike *Baldwin*, the Pennsylvania law does not project itself into any other state. To the contrary, it merely

establishes a minimum selling price for the various milk marketing areas at which *all participants* in the market must charge. The minimum prices apply to all sellers, whether in or out-of-state. And, to the extent minimum prices are a burden on commerce, they are, in this instance, an equal burden on both internal and interstate commerce. Petitioners assert that out-of-state dealers lose competitive advantages that have accrued to them by virtue of alleged lower costs of production, without citing or adducing any facts demonstrating such competitive advantages. Moreover, all large and efficient in-state dealers are equally affected by the geography-neutral minimum prices, a point which goes to the heart of negative commerce clause analysis.

Similarly, Petitioners' reliance on *West Lynn Creamery* is misplaced, as the Commonwealth Court correctly concluded. In that case, the Court invalidated a Massachusetts pricing order which imposed an assessment on all fluid milk sold by dealers to Massachusetts retailers. Two-thirds of that milk came from out-of-state, but the entire assessment was distributed *only to in-state dairy farmers.* It is in this fact that Petitioners fail to appreciate the main point of *West Lynn Creamery,* namely, that the discrimination which resulted from the distribution of that assessment effectively turned the facially-neutral "assessment" into a tariff. Out-of-state producers were directly subsidizing their in-state competitors. No such subsidy exists in this case.

Petitioners next stumble into their most unfortunate and perhaps most shocking misrepresentation of fact – that the Pennsylvania pricing scheme must fall because it sets prices with reference only to in-state dealers already doing business in the particular milk marketing area.

The Board is required to, and did in this instance, take into account the costs of out-of-state producers in calculating the Area I minimum prices. See 31 P.S. 700j-801. See also *Lily-Penn Food Stores, Inc. v. Pennsylvania Milk Marketing Bd.*, 62 Pa. Commw. Ct. 597, 437 A.2d 485 (1982), which stated: "[d]ealers or handlers marketing milk in an area subject to Pennsylvania law, whether located there or out of state, are directly affected by price-setting orders, and are potential 'interested parties' under Section 801. Participation of a sampling of them in the proceedings is clearly warranted." 437 A.2d at 489. The Board's cross-section for the order under attack by Petitioners consisted of five dealers. Two out-of-state dealers were invited to participate, one of which accepted. (App., 4a). This fact belies petitioners' representation and insinuation that out-of-state dealers' prices are subject to the mercy of in-state dealers. Conclusively, the Board considered the costs of dealers *without* reference to the state in which they happened to be located.

These facts squarely distinguish the Pennsylvania law from that at issue in *Camps Newfound/Owatanna, Inc. v. Town of Harrison, Me.*, 137 L.Ed.2d 852 (1997). There, the Court struck down a facially discriminatory state law that gave preferential tax treatment to charities that serve primarily in-state clients in contrast to charities serving primarily out-of-state clients. The Court likened the Maine tax to the milk assessment in *West Lynn Creamery*, holding that the tax had the effect of an import tariff, though in *Camps Newfound* the tariff was imposed on campers, not goods or commodities. *Id.* at 867. The Court also concluded that the Maine tax law encouraged affected charities to limit their out-of-state clientele. *Id.* at 864.

Unlike statutes in the above cases, the Pennsylvania law does not in any way discourage out-of-state dealers from participating in the Pennsylvania market. Moreover, the Pennsylvania law does not lead consumers to purchase their milk from in-state sellers instead of out-of-state sellers. It is also for these reasons that this case is distinguishable from *Dairymen, Inc. v. Alabama Dairy Comm'n*, 584 F.2d 707 (5th Cir. 1978), where the state implemented a quota system that guaranteed, in perpetuity, that the vast majority of class I milk for sale in Alabama be purchased from existing in-state producers who were already "locked in" to their quota. In this case, there is nothing akin to such quota.

Finally, in fashioning their "discriminatory effect" argument, Petitioners claim that the state court "misread" this Court's decision in *Exxon, supra,* and "exacerbated the similar misreading of that decision by the Third Circuit" in *Norfolk Southern, supra.* Petition at p. 14. Petitioners claim that *Exxon,* where the Court upheld Maryland's prohibition against ownership of gas stations by refiners, is a limited case with narrow application, driven only by the fact that there were no relevant in-state firms on which to base a comparison of discrimination in favor of in-state interests. This characterization of *Exxon* and its progeny by petitioners is erroneous. The fact that this Court *did* examine relative in-state and out-of-state considerations, and coincidentally found no direct interstate competitors (i.e., there were no refiners located in Maryland) itself speaks to the fact that the burdens and benefits on out-of-state and in-state competitors respectively must be examined by any court applying the negative commerce clause principles.

Petitioners also cite to – and dramatically misread – this Court's decision in *C & A Carbone, Inc. v. Clarks-*

town, N.Y., 511 U.S. 383 (1994). Petitioners assert that the regulation there at issue, a flow-control ordinance which required all solid waste to be processed at a designated transfer station before leaving the municipality, was not facially discriminatory. This is incorrect. The Court clearly states that "[a]s we find that the ordinance discriminates against interstate commerce, we need not resort to the *Pike* test." *Id.* at 390. The ordinance at issue in *Carbone* was overtly discriminatory in that it required all non-recyclable solid waste be processed by a single processor. This case was thus much like *Dean Milk Co. v. Madison, Wis.*, 340 U.S. 349 (1951), in that it was a "favored local operator" case. *Carbone*, 511 U.S. at 389. The discriminatory effect on the non-favored operators, including some in-state but *all* out-of-state operators, was central to the Court's holding.

Petitioners' argument stands for the proposition that it is *irrelevant* whether in-state interests are also affected by the allegedly discriminatory regulation in a negative commerce clause analysis. The patent absurdity of this argument can be demonstrated summarily: if the effect of a regulation on in-state interests is irrelevant, how can a court possibly even weigh whether that regulation is discriminatory? Discrimination, that is, economic favoritism on behalf of in-state interests, has long been the hallmark of negative commerce clause analysis. See *Baldwin* and *Pike, supra.* That the Pennsylvania milk pricing scheme affects in-state interests in exactly the same manner as it affects out-of-state interests is the clearest possible evidence that neither the statute's purpose nor its effect is to discriminate against interstate commerce. There is simply no benefit to any in-state interest that comes at the expense of out-of-staters. All are affected, and affected equally.

Economic favoritism and burdens on interstate commerce are the *sine qua non* of invalidity under the negative commerce clause. See *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*, 511 U.S. 93, 99 (1994), where the Court wrote that discrimination simply means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Because the Pennsylvania statute here at issue is even-handed in purpose and effect, there is simply no way Petitioners can demonstrate that in-state dealers and out-of-state dealers are treated or impacted differentially.

To suggest that the equal treatment of in-state and out-of-state interests is irrelevant is a desperate argument by petitioners, who have transparently attempted to manufacture a "conflict" in negative commerce clause jurisprudence where none exists. The principles followed by the Commonwealth Court in this matter are those handed down by this Court and uniformly followed by all federal circuit courts.

C. The Incidental Burdens Of The Milk Marketing Law On Interstate Commerce Are Outweighed By Its Legitimate Local Benefits.

Petitioners assert that the state court erred when it applied the negative commerce clause balancing test and concluded that the statute's local benefits outweigh its effects on interstate commerce. More specifically, petitioners claim that the local benefits considered by the state court have been "classified as illegitimate" by this Court. Petitioners have against misapplied this Court's teachings. The cases they cite are all overt discrimination cases, *not* balancing test cases. There-

fore, the local interests that were purportedly "classified as illegitimate" by this Court were, in reality, being measured against the *per se* rule of invalidity, *not* against the presumption of validity underpinning the balancing test. As this Court is well aware, nearly *any* proffered local justifications will fail when the Court is applying the *per se* rule of invalidity, which does not apply in this case in the absence of discriminatory purpose, application or effect of the Pennsylvania law.

Petitioners cite first to *New Energy Co. v. Limbach*, 486 U.S. 269, 273-74 (1988) for the proposition that the state's justification for its law must be "unrelated to economic protectionism." Petition at p. 18. In context, the cited quotation simply states the well-known rule that state statutes which clearly discriminate against interstate commerce are routinely struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. 486 U.S. at 274 (citations omitted). Petitioners are thus incorrect in ascribing error to the state court on these grounds, because the state court was properly applying the balancing test, not the *per se* rule of invalidity. Petitioners cite *Baldwin* for a similar proposition, but that case also involved clear discrimination and *per se* invalidity of a state law.

When applying the balancing test, as the Commonwealth Court properly did, the presumption is in favor of the validity of the statute or regulation. Thus, the state is not required to justify its regulation under the most exacting scrutiny of the *per se* rule of invalidity. The reviewing court may properly consider the economic rationale that underlies the rule, as well as the other reasons reflected in the record – namely, protecting the public interest, insuring a sufficient quantity of pure and

wholesome milk to the inhabitants of the Commonwealth, and paying special regard to the health and welfare of the children residing in Pennsylvania. 31 P.S. §700j-801.

Finally, the Pennsylvania Milk Marketing Law places only incidental burdens on interstate commerce, which are more than outweighed by the legitimate and reasonable benefits of the statute. As the court held in *United Dairy Farmers Cooperative Ass'n. v. Milk Control Comm'n. of Pa.*, 335 F. Supp. 1008, 1014 (M.D. Pa. 1971), *aff'd*, 404 U.S. 930, Pennsylvania's minimum pricing law "(does) not burden but (has) only an incidental effect on interstate commerce which would not prevent Pennsylvania from pursuing its legitimate goals." The state court reached a similar conclusion on similar grounds and committed no error of constitutional dimensions warranting a writ of certiorari by this Court.

CONCLUSION

Certiorari is not warranted. The Pennsylvania Commonwealth Court correctly applied uniform governing precedent of this Court and conforming holdings of other federal and state courts in finding that the Pennsylvania Milk Marketing Law does not discriminate against interstate commerce in administration of a statute found by this Court to be an appropriate exercise of the Commonwealth's police power. For the reasons set forth above, Respondents respectfully request that this Court deny Petitioners' Petition For Writ Of Certiorari.

Respectfully submitted this 22nd day of September, 1997.

J. JACKSON EATON, III
GROSS, McGINLEY,
LaBARRE & EATON, LLP
33 South Seventh Street
P.O. Box 4060
Allentown, Pennsylvania
18105-4060
(610) 820-5450
Attorney for Respondent
Lehigh Valley Dairies, Inc.

DONALD A. TORTORICE
(Counsel of Record)
DOUGLAS M. WOLFBERG
DUANE, MORRIS &
HECKSCHER, LLP
305 North Front Street
5th Floor
P.O. Box 1003
Harrisburg, Pennsylvania
17108-1003
(717) 237-5500
Attorneys for Respondents.

APPENDIX

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE THE PENNSYLVANIA MILK MARKETING BOARD (June 1995)

[500] Q. You mentioned to me that the adults who buy this milk tend to be kind of a coffee klatch group. Could you explain that to the Board how that works?

A. Well, I think many of our sales of half pints to the adults are for their coffee – little coffee pool, coffee pool, something. It's not really essentially for their own consumption.

Q. Now, let me ask one more question in that area. When you resell the milk in those limited situations, what is the price or the price range that you resell it?

A. It's 35 cents a half pint to the students and, by regulation, I believe it's 40 cents to adults.

We must charge something more for the adults than we charge for the students.

Q. How did you arrive at those prices for your .05 percent of resale?

A. Our standard markup for over the counter sales of any food product is 100 percent, so the 35 cents would equate to 17-½ cent cost on milk.

* * *

[502] rest of our talking about is the 99.95 percent of your milk purchases that you use in the school lunch program, school lunch and school breakfast program.

You mentioned that the federal government reimburses you for these various meals. Can you explain to the Board what the reimbursement rates are and in what proportions they occur and on what basis?

A. The National School Lunch Program provides free or reduced price meals to students. Eligibility for those meals is determined by the student's household income and size.

In Philadelphia – oh, I'm sorry – in addition, if a child does not qualify for free or reduced meals, they will be forced to pay the full price of the meal, the platter, in Philadelphia. And that's $1.50.

The government has a three-tiered reimbursement rate for both lunch and breakfast.

Q. Just to clarify, you're discussing just the federal government?

A. Federal government, right. The [503] State, and I can explain that if you wish?

Q. Do the fed first and then we'll do the state. I think it's easier that way.

A. Okay, as I go through each one, why don't I give you the federal and the state and then give you a total?

Q. Okay.

A. So there's three tiers and the federal government reimburses us so much for a free meal, whether breakfast or lunch, so much for a reduced price meal, and they even give us a reimbursement for meals of children who pay full price.

For breakfast, the federal government gives us $1.16 for each child who is determined to be in the free category, the state chips in ten cents, so we get $1.26 for every free breakfast we serve.

For a child who pays a reduced price, the government gives us less 86 cents for a breakfast, the federal government, the state continues the 10 cent reimbursement, so we get 96 cents for breakfast.

If a child pays the full price, the [504] federal government gives us 19 cents, and the state, again, gives us ten cents. So that's 29 cents for breakfast reimbursement.

For lunch it's higher. A child who receives a free lunch is claimed for $1.78 from the federal government.

The state gives us approximately eight cents. It can vary depending on the special incentive that the state has, which is very esoteric. I'll explain it if you want, but it's between eight cents and ten cents.

So the total reimbursement for a free lunch from the federal government is $1.86. I'm sorry, $1.78 and eight cents, so the total reimbursement is $1.86.

For a reduced price lunch, the federal government provides us $1.38, the state, again, eight cents; $1.46 for a reduced price lunch.

And if a child pays the full price for lunch, the federal government gives us 19 cents and the state gives us eight cents, so we get 27 cents for a fully paid lunch.

Q. Now, have you – are you aware that

* * *

[509] A. Approximately 18 cents.

Q. Now, that would mean then that milk accounts for, depending on the meal, 15 percent to 30 percent of your food cost, is that correct?

A. That's correct.

MR. TORTORICE: If you could indulge me, I missed the numbers with respect to cost of food for lunch.

THE WITNESS: The cost of food for lunch in the heat and eat program is 95 cents, and in the full service program, it's 72 cents. That's food cost.

MR. TORTORICE: Thank you.

BY MR. SCHNURER:

Q. Now, if the milk prices you pay is raised or is higher than it might otherwise be, what effect does that have on the school district and its meal programs?

A. Well, on the expense side, of course it adds to cost. So without an increase in revenue, which we won't get resulting from the increase in the price of milk from the federal government, and absent an increase in

* * *

[878] market are represented.

We also review the delivery types specifically to ensure that the deliveries are representative as that is a key issue in developing a price.

We feel that the cross section selected is highly representative.

BY MS. ULRICH:

Q. Could you go into just briefly the process of selecting these dealers and how that process culminates in the petitioning dealers using the same cross section as does the Board?

A. As I said, we review a listing of dealers that sell into the area, review the quantities of milk sold in to first ensure that it's representative in that way. That would be our first selection process.

In the case of the Area 1 cross section, we had initially selected Cumberland Farms to participate in the cross section.

We received very strong objection from Cumberland Farms to being in the cross section and we wanted representation from out of state, knowing that Area 1 is a highly [879] competitive area and that the New Jersey influence should not be overlooked.

To replace Cumberland, we then selected Readington Farms in New Jersey, knowing that they are a large efficient dealer and would represent well the out-of-state influence.

Also, we wanted to make sure that the delivery types were representative, so we looked at a non-processor in the area and saw that they had significant deliveries in the area and also included in our cross section Balford.

And these decisions were communicated to the Milk Dealers Association, Carl Herbein, in particular. He concurred with our judgment on that and they became cross section dealers.

Container Costs – produced and marked for identification as Staff Exhibit No. 1.

BY MS. ULRICH:

Q. Let's move on then to your exhibits.

Looking at your pre-submitted Exhibit 1, would you please take us through that

* * *

[904] in sizes or types of containers without a price may be used until authority is granted by the Board.

Would you have any comment with regard to the Board's considering a possible revision of that particular provision?

A. Since it is Board policy to encourage milk sales and to the extent that new types of containers may promote that, any revision of that language which would make it easier to introduce new types of containers to the marketplace would be positive and we would endorse such a revision

Q. Finally, just one more question.

Again, referring to Mr. Herbein's testimony, he was asked on cross examination what effect significant reductions in prices would have on the marketplace and on consumer behavior.

How would you answer that same question?

A. Knowing that the market price for milk, the MW price, fluctuates significantly throughout the year, we are aware that [905] consumption patterns do not mirror those changes significantly, so that we would say that consumption patterns are not overly affected by changes in pricing.

It takes just as much milk to put on your Cheerios if it's $2.00 a gallon as $2.10. So, we think that milk is relatively inelastic and thus the price is exorbitant.

MS. ULRICH: Thank you.

That concludes my direct examination, Mr. Chairman.

MR. DERRY: Thank you.

Cross examination, Don?

CROSS EXAMINATION

BY MR. TORTORICE:

Q. Mr. DeSantis, with respect to the costs that are set forth in the various exhibits of Staff, do you have an opinion as to whether the range of costs exhibited by the cross section for Area 1 is typical or atypical of costs generally of dealers in Area 1?

A. We believe those costs to be typical.

Q. Therefore, you would find them,

* * *

[961] gallon equivalent using your weighted average cost than three of the four dealers actually incurred during 1994.

Would you consider that to be an unintended profit for the dealers if the dealer's costs or even your cost gets used as one of the bases to formulate a minimum price order?

A. Not at all. The reason for that answer is that with the cross section mentality, some dealers will win, some dealers will lose.

The dealer with the higher costs will not fully recover those costs. His costs should be represented and they are a significant part of the sales in the cross section, and should not be ignored.

So, we think that is entirely proper to put those in there and we strenuously resist any deletion of high cost dealers or low cost dealers from the cross section.

We believe the cross section we picked is the correct cross section.

Q. That all depends on whether or not the cross section is representative of [962] something. It's got to be representative of something, correct?

A. We believe the cross section we selected is representative of milk marketing in Area 1, period.

Q. I haven't cross-examined on that yet.

All right, let's continue.

I've now finished with the first two pages of Exhibit 1. Exhibit 1 has a third page. The first thing it says half pint – oh, I see.

A. The last page is simply the total, what remains of the total.

Q. Of the five or with half pint?

A. Right.

Q. But you only have half pint. In my last page, you don't have anything else.

I'm sorry. It starts at the bottom of page 2, right?

A. Right.

Q. 92.2 and so forth?

A. Right.

Q. And those figures would be the same

* * *